

GAO

Report to the Honorable
Edward M. Kennedy and the Honorable
Robert G. Torricelli, U.S. Senate

June 2000

CONTINGENT WORKERS

Incomes and Benefits Lag Behind Those of Rest of Workforce



G A O

Accountability * Integrity * Reliability

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Abbreviations

BLS	Bureau of Labor Statistics
DOL	Department of Labor
ERISA	Employee Retirement Income Security Act
IRA	individual retirement account



United States General Accounting Office
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**Health, Education, and
Human Services Division**

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The Honorable Edward M. Kennedy
The Honorable Robert G. Torricelli
United States Senate

The nature of employment for many Americans is changing. Millions of workers are no longer in traditional work arrangements—full-time, year-round jobs in which employers usually provide workers with benefits—but rather in temporary, part-time, contract, and other types of nonstandard work arrangements. These arrangements are often referred to as “contingent” work. In recent years, researchers and groups such as labor organizations have raised concerns about whether this segment of the labor force is growing and how these workers are treated compared with the rest of the workforce, particularly in the areas of health care and pension benefits. Moreover, these concerns have gained greater visibility as some groups of contingent workers have sued major companies for better treatment and benefits.

Because of your concerns about the status of contingent workers, you asked us to provide information on (1) the nature and size of the contingent workforce; (2) the extent to which contingent workers have access to health insurance and pensions; (3) the protections afforded these workers under laws regarding family and medical leave, retirement income, hourly wages, labor relations, civil rights, and health and safety; and (4) options available for providing contingent workers increased access to employee benefits and increased coverage under laws designed to protect workers. To address these questions, we analyzed data from the Department of Labor’s (DOL) Bureau of Labor Statistics’ (BLS) Current Population Survey, which is used to periodically survey people about their work and benefits, and a supplement developed to collect information on the contingent workforce. We also talked with labor experts and representatives of worker groups and employer associations about the nature of contingent work and the options available to increase workers’ access to benefits and worker protections. We conducted our work from July 1999 to June 2000 in accordance with generally accepted government auditing standards. Appendix I contains a detailed discussion of the scope and methodology of our review.

Results in Brief

The contingent workforce comprises many categories of workers, ranging from highly paid management consultants who are satisfied with their work arrangements to low-paid service sector workers who receive no benefits and would rather have full-time, permanent jobs. The size of the contingent workforce, however, cannot be precisely estimated because no consensus exists on which categories of workers should be included. Labor experts and others generally agree that workers who lack job security and have unpredictable work schedules, such as temporary and on-call workers, should be included in the definition of the contingent workforce. However, there is less agreement on whether workers such as independent contractors, self-employed workers, and part-time wage and salary workers should be included. Many of these individuals work in relatively permanent employment arrangements; however, they may have less job security and less predictable work schedules than workers in traditional, full-time work arrangements. Estimates of the size of the contingent workforce range from 5 percent of the total workforce, when only the categories of temporary and on-call workers are included, to almost 30 percent when workers in the other categories are added. Workers in most of these categories are more likely than workers in more traditional full-time work arrangements to have low family incomes, and many have incomes below the federal poverty threshold.

Contingent workers are also less likely than the rest of the workforce to receive health insurance and pension benefits through their employers. Many of these workers either are not offered benefits by their employers or do not qualify for benefits because they do not work enough hours or have not worked for their employers long enough. Furthermore, when their employers offer health insurance and pension plans, many contingent workers do not participate because of the cost of the plans. Contingent workers who have low family incomes are even less likely to be included in employer-provided health insurance and pension plans or to participate in the plans when they are offered.

Most contingent workers who are employees are covered by key laws designed to protect workers. However, workers who are not employees— independent contractors and other self-employed workers—are generally not covered by the laws, and some workers who are employees are not covered or may not be able to take advantage of the protections afforded by these laws. For example, the Family and Medical Leave Act, which allows workers to take unpaid, job-protected leave, contains job tenure and minimum hours requirements that result in some temporary and part-time

workers not being covered by the law. Moreover, because it can be difficult to determine whether workers are employees or independent contractors, and because employers sometimes misclassify workers as independent contractors, contingent workers who should be covered sometimes are not. In addition, because many contingent work arrangements involve more than one company, such as a temporary employment agency and a client firm, it is sometimes difficult to determine which company is the employer that should be held accountable for compliance with the laws.

Since contingent workers are less likely to receive health insurance and pension coverage through their employers than the rest of the workforce and many of them are not covered under key laws designed to protect workers, advocates for these workers have proposed a range of strategies to expand coverage for contingent workers. Each strategy involves trade-offs in terms of costs and benefits. Some proposals seek to build on the current employer-employee relationship by assuming employers will continue to serve as the primary vehicle for providing health insurance, pension coverage, and worker protections. One proposal, for example, calls for legislation that would require employers to offer comparable benefits and compensation to all their workers regardless of the number of hours they work each week. Although this proposal would extend benefits to many contingent workers, employers might reduce employees' salaries or hire fewer workers to cover the increased costs of providing benefits to more employees. Other proposals seek new approaches outside the traditional employer-employee relationship. One such approach would create associations of people in similar jobs that could purchase insurance as a group, which might make their coverage more affordable and provide an option for contingent workers who do not have access to employer-provided benefits. A number of other proposals are designed to increase workers' access to health insurance and retirement benefits, for example, by providing tax breaks to individuals for the cost of health insurance premiums and retirement-related savings accounts. Opponents of these proposals, however, cite the costs of these programs, their administrative complexity, and the possibility that the programs might not benefit the individuals targeted.

DOL generally agreed with our findings and provided technical comments on the report, which we incorporated.

Background

The term “contingent” has been used for many years to describe a variety of nonstandard work arrangements. It was first used in 1985 to describe the impermanent nature of certain work arrangements, such as the practice of hiring workers only when there is an immediate and limited demand for their services, without any offer of permanent or even long-term employment.¹ Consistent with this concept, some definitions of contingent work have focused on work that provides a relatively low level of job security. The term contingent has also been expanded by some labor experts to include work arrangements with more variable or less predictable hours, as well as arrangements that reflect a change in the traditional rights of workers and the benefits offered to them. This expanded definition can include such varying employment arrangements as independent contracting; part-time work; or any work arrangement that is not long-term, year-round, full-time employment with a single employer. Under this definition, the term “contingent” is used to describe a broad range of work arrangements; however, some labor experts prefer terms less linked to job security, such as “nonstandard,” “flexible,” or “alternative” work arrangements.

Until recently, no nationally representative data on contingent workers existed. In 1995, BLS introduced a supplement on contingent workers to the Current Population Survey, a monthly survey of some 50,000 households whose answers to a set of questions are the primary source of nationally representative data on the U.S. labor force. BLS developed a series of supplemental questions—the Contingent Work Supplement—to identify workers whom BLS considered contingent.² The supplemental survey has been used three times: in 1995, 1997, and 1999.

¹Labor economist Audrey Freedman defined contingent work in a speech at a 1985 conference on employment security as “conditional and transitory employment relationships as initiated by a need for labor—usually, because a company has an increased demand for a particular service or product or technology, at a particular place, at a specific time.”

²The Contingent Work Supplement was designed to identify workers BLS considered contingent in terms of their job security and those who work in alternative work arrangements. See app. I for more information.

Under current laws, employers are generally required to provide their employees with a basic set of protections against loss of income—both during retirement and because of disability.³ For example, employers are required to collect, pay, and report taxes for Social Security and Medicare benefits.⁴ Although the employer collects and remits taxes for Social Security and Medicare hospital insurance, employers and employees contribute equal amounts.⁵ Self-employed workers and independent contractors generally must pay these taxes themselves, contributing both the employee and employer shares. Employers are required to pay an additional tax for unemployment insurance for their workers.⁶ Most employers are also required to provide workers' compensation insurance for their employees.⁷ In most states, self-employed workers and independent contractors are not eligible for unemployment insurance or workers' compensation benefits.

³The requirements for these protections vary from law to law, and most, but not all, workers are covered.

⁴Social Security provides benefits to retired and long-term disabled workers and their dependents and survivors. Medicare provides hospital and medical insurance benefits to those aged 65 and older, as well as to certain others. The hospital insurance portion of Medicare is paid by both employees and employers; the medical insurance portion is funded by both the federal government and premiums paid by enrollees.

⁵In 2000, employers and employees will each contribute 7.65 percent of an employee's wages up to a wage limit of \$76,200.

⁶The unemployment compensation system, funded by both federal and state payroll taxes, pays benefits to workers in covered jobs who become unemployed and meet state-established eligibility rules.

⁷Workers' compensation programs provide cash, medical benefits, or both to workers or their families when the workers are injured, become ill, or die while performing their job. Benefits are provided under state and federal laws. Most workers are covered by state programs fully funded by employers; benefits are provided through commercial insurance carriers, state funds, or self-insurance mechanisms. Federal employees and workers in the maritime industry are covered by federal programs.

In addition to these mandatory protections, employers may offer benefits such as health insurance and pensions to workers. Employers' decisions to offer these and other benefits, and the type and breadth of the benefits offered, depend on a complex set of gains and costs that each employer must regularly consider in light of current business needs. Benefits such as health insurance can help employers attract and retain valuable employees, which can be particularly important during periods of low unemployment and increased competition for skilled workers. Moreover, the federal government offers employers a variety of tax incentives to provide certain health and pension benefits because it has an expressed interest in expanding health and pension coverage. However, providing these benefits is not without cost. Employers may decide to pay all of the costs of health insurance and pension plans; however, they may do so in lieu of higher pay. Alternatively, employees may be required to pay all or a portion of the costs.⁸ In addition, employers incur costs in administering benefit programs, and these costs can be significant enough to inhibit employer decisions to form or expand benefit programs, according to employer groups. Workers may also obtain benefits through other vehicles, such as unions or employee associations. In some cases, employers may contribute to these benefit plans.

⁸Two types of pension plans are available to workers through their employers: defined benefit plans and defined contribution plans. Under a defined benefit plan, benefits are generally based on a formula linked to a worker's earnings and years of employment, and the employer is responsible for funding the benefits. Under a defined contribution plan, an amount is contributed to a retirement account for a worker, and benefits are based on the amount contributed to the account and earnings on that amount; the employee bears the risk of any loss. The employer generally contributes to the plan, but often the worker is permitted or expected to make contributions.

Concern surrounding contingent work arises because, in many cases, the nature of the arrangement implies that no formal, long-term link exists between the employer and the employee. Because the link to their employers is often tenuous, many contingent workers may not be covered under employer-sponsored plans. As a result, some government officials and labor analysts are concerned that contingent employment relationships may have long-term adverse consequences for workers and government programs. To the extent that contingent workers do not receive health or pension benefits or qualify for unemployment or workers' compensation, these workers might turn to needs-based programs such as Medicaid⁹ or Supplemental Security Income.¹⁰ To the extent that this occurs, costs formerly borne by employers and employees may be shifted to federal and state public assistance budgets.

A recent survey of employers shows that employers use contingent work arrangements for a variety of reasons.¹¹ According to the survey, employers hire contingent workers to accommodate workload fluctuations, fill temporary absences, meet employees' requests for part-time hours, screen workers for permanent positions, and save on wage and benefit costs, among other reasons. However, some worker advocacy groups contend that employers use contingent workers for other reasons, such as to avoid paying benefits, reduce their workers' compensation costs, prevent workers' attempts to unionize, or allow them to lay off workers more easily.

Data from the BLS Contingent Work Supplement indicate that workers take temporary and other contingent jobs for a variety of reasons, both personal and financial. These reasons include workers' preference for a flexible schedule due to school, family, or other obligations; need for additional income; inability to find a more permanent job; and hope that the position will lead to permanent employment.

⁹The Medicaid program provides medical assistance largely to low-income people who are aged, blind, or disabled.

¹⁰The Supplemental Security Income program provides income assistance to aged, blind, or disabled people with limited income and resources.

¹¹Susan Houseman, *Temporary, Part-Time, and Contract Employment in the United States: A Report on the W.E. Upjohn Institute's Employer Survey on Flexible Staffing Policies* (Kalamazoo, Mich.: W.E. Upjohn Institute for Employment Research, Nov. 1996, revised June 1997).

Contingent Workers Are a Diverse Group but Are More Likely to Have Low Incomes Than Other Workers

Many different categories of workers could be considered part of the contingent workforce, and labor experts and others do not agree on which categories should be included. As a result, it is difficult to generalize about this workforce as a whole. Depending on which categories are included, the size of the contingent workforce can range from 5 percent to almost 30 percent of the total workforce. Nevertheless, workers in most of the categories that could be considered part of the contingent workforce share a common characteristic: they are more likely to have low incomes than similar workers in traditional full-time work arrangements.

Contingent Workers Differ by Category

There are a number of categories of workers who are not in standard, or traditional, work arrangements—that is, these workers are not wage and salary workers who usually work at least 35 hours a week in relatively permanent jobs. Figure 1 lists and describes such categories of workers, who could be included in the definition of the contingent workforce. In developing these descriptions, we drew on BLS data and research on contingent workers.¹²

¹²Susan Houseman, *Flexible Staffing Arrangements: A Report on Temporary Help, On-Call, Direct-Hire Temporary, Leased, Contract Company, and Independent Contractor Employment in the United States* (Kalamazoo, Mich.: W.E. Upjohn Institute for Employment Research, Aug. 1999).

Figure 1: Categories of Workers Who Could Be Considered Contingent

Agency Temporary Workers (Temps)	Individuals who work for temporary employment agencies and are assigned by the agencies to work for other companies ("client firms"), such as temporary workers supplied to companies to fill in for full-time workers who are on vacation or to work on special projects
Direct-Hire Temps	Temporary workers hired directly by companies to work for a specified period of time, such as seasonal workers and workers hired to work on special projects
On-Call Workers	Individuals who are called to work only on an as-needed basis, such as substitute teachers and construction workers supplied by union hiring halls
Day Laborers	Individuals who get work by waiting at a place where employers pick up people to work for the day, such as low-skilled construction workers
Contract Company Workers	Individuals who work for companies that provide services to other firms under contract, such as security, landscaping, or computer programming services
Independent Contractors^a	Individuals who obtain customers on their own and provide a product or service (and who may have other employees working for them), such as maids, realtors, child care providers, and management consultants
Self-Employed Workers	Self-employed workers who are not independent contractors, such as doctors and individuals who own restaurants and shops
Standard Part-Time Workers^b	Individuals who regularly work fewer than 35 hours a week for a particular employer and are wage and salary workers
Leased Workers^c	Individuals who work for leasing companies (some of which are called "professional employer organizations") that usually handle payroll, employee benefit programs, and other human resource functions for the companies to which they lease workers

^aThis category includes all individuals who identified themselves as an "independent contractor, consultant, or freelance worker" regardless of whether they were wage and salary workers or self-employed. Individuals' categorization of themselves as independent contractors does not necessarily mean that they meet the legal definition of an independent contractor.

^bAlthough all of the other categories of workers listed may also work part-time, standard part-time workers have an attachment to a particular employer and are not in one of the other categories. These workers may work in long-term work arrangements.

^cInformation on leased workers was not collected by BLS in the most recent Contingent Work Supplements; therefore, data on these workers are not included in our report.

The characteristics of these individuals differ by category. For example, according to data from the BLS Contingent Work Supplement, direct-hire temps and standard part-time workers are likely to be younger (under age 25) than workers in the other categories, while a greater number of self-employed workers and independent contractors are older (aged 55 and older). A much larger proportion of contract company workers are male (71 percent) than of standard full-time workers (56 percent), while a larger proportion of standard part-time workers are female (70 percent) than of standard full-time workers (44 percent). In comparing the percentages of contingent workers by race, the largest difference between contingent workers and standard full-time workers is that the percentage of agency temps who are black (21 percent) is higher than the percentage of standard full-time workers who are black (12 percent). Workers' preferences for contingent work also vary by category, according to BLS. Most agency temps, on-call workers, and day laborers would prefer a permanent job, while most independent contractors, self-employed workers, and standard part-time workers prefer their current work arrangements.¹³ (App. II contains detailed information from the 1999 BLS Contingent Work Supplement on the characteristics of workers in each category, including age, gender, race/origin, education, geographic location, industry, and occupation.)

Although contingent workers are employed in a wide variety of industries and occupations, the largest proportion of them are employed in service industries. Of contingent workers in services, the largest percentages of agency temps are in business services, such as data processing services, while the other categories of contingent workers tend to work in professional services, such as nursing, engineering, or accounting. Of those who work in professional services, a large percentage of direct-hire temps (over 33 percent) and on-call workers (over 19 percent) work in educational services—for example, as substitute teachers or college teachers with temporary contracts.

¹³Different categories of contingent workers were asked different questions about their preferences. Agency temps, on-call workers, day laborers, and contract company workers were asked whether they would prefer to have a permanent rather than a temporary job. Independent contractors and self-employed workers were asked whether they would prefer to work for someone else rather than continuing in their current work arrangement.

Size Estimates Differ Depending on the Definition of the Contingent Workforce

Estimates of the size of the contingent workforce depend on which categories are included. Because there is a lack of consensus about which categories of workers should be included in the workforce, these estimates vary. While BLS' Contingent Work Supplement provides the first nationally representative data on this segment of the workforce, it has been criticized by some as defining the contingent workforce too narrowly. BLS officials chose likely job tenure as a defining factor for contingent work and, therefore, excluded from two of their three estimates of the contingent workforce workers who had been in their current jobs for more than a year or who expected to continue in their current jobs for more than a year, albeit in temporary positions.¹⁴ For example, BLS included only 57 percent of agency temps and 28 percent of on-call workers in its estimate of the contingent workforce for 1997.

Many labor experts agree that workers with employment arrangements that lack job security and workers with work schedules that are variable, unpredictable, or both—such as agency temps, direct-hire temps, on-call workers, and day laborers—should be included in the definition of the contingent workforce. Taken together, these categories constitute 5 percent of the total workforce. There is less agreement, however, that contract company workers, independent contractors, self-employed workers, and standard part-time workers should be included in the definition of the contingent workforce. For example, BLS does not include many standard part-time workers in its definition of the contingent workforce, arguing that many of these workers are as attached to their employers as full-time workers are. Many labor experts and others, however, include these part-time workers because they differ from standard full-time workers who have long-term, full-time employment with a single employer and who may be more likely to receive employer-provided benefits such as health insurance and pensions. Similarly, BLS does not include many self-employed workers in the contingent workforce because many of these individuals have stable employment situations (for example, doctors and shop owners). Others, however, include self-employed workers, maintaining that some of these workers do not have the

¹⁴In two of its three estimates of the contingent workforce, BLS included only workers who indicated that they had worked for their current employer 1 year or less and that they expected to work in their current job for 1 year or less. BLS expanded its third estimate to include wage and salary workers who indicated that even if the economy did not change and their job performance was adequate, they could not continue in their current jobs as long as they wished.

same level of job security as standard full-time workers or are less likely to have benefits or to be covered by laws designed to protect workers. If all of the categories are included, the contingent workforce makes up almost 30 percent of the total workforce.

Table 1 shows the number and percentage of workers in each category. The number of leased workers is not included in these estimates because data are not available on the size of the group.¹⁵

Table 1: U.S. Workforce by Category of Worker, 1999

Category of worker	Number of workers (in thousands)	Percentage of total workforce
Agency temps	1,188	0.9
Direct-hire temps	3,227	2.5
On-call workers and day laborers	2,180	1.7
Contract company workers	769	0.6
Independent contractors	8,247	6.3
Self-employed workers	6,280	4.8
Standard part-time workers	17,380	13.2
Subtotal	39,271	29.9^a
Standard full-time workers	92,222	70.1
Total workforce	131,493	100

^aPercentages do not add up to subtotal because of rounding.

Source: GAO analysis of data from the BLS February 1999 Contingent Work Supplement.

¹⁵BLS did not obtain information on leased workers in the Contingent Work Supplement. A question on leased workers was included in the 1995 supplement but no usable data were obtained because the definition of a leased worker was not clear to the respondents. As a result, the question was deleted from subsequent versions.

Contingent Workforce Has Not Grown in Recent Years

As measured by the BLS Contingent Work Supplement, since 1995, the percentage of contingent workers as a proportion of the total workforce has decreased—from 32.2 percent in 1995 to 29.9 in 1999. Over this period, no individual category of workers changed significantly, except that of self-employed workers, which also decreased from 1995 to 1999.¹⁶ Some labor experts attribute these changes to the strong U.S. labor market in the mid- and late 1990s, which made the number of standard full-time jobs more plentiful. Table 2 shows the percentage of workers in each category according to the 1995, 1997, and 1999 February Contingent Work Supplements.

Table 2: U.S. Workforce by Category of Worker, 1995, 1997, and 1999

Category of worker	February 1995		February 1997		February 1999	
	Number of workers (in thousands)	Percentage of total workforce	Number of workers (in thousands)	Percentage of total workforce	Number of workers (in thousands)	Percentage of total workforce
Agency temps	1,181	1.0	1,300	1.0	1,188	0.9
Direct-hire temps	3,393	2.8	3,263	2.6	3,227	2.5
On-call workers and day laborers	2,014	1.6	1,977	1.6	2,180	1.7
Contract company workers	652	0.5	809	0.6	769	0.6
Independent contractors	8,309	6.7	8,456	6.7	8,247	6.3
Self-employed workers	7,256	5.9	6,510	5.1	6,280	4.8
Regular part-time workers	16,813	13.6	17,290	13.6	17,380	13.2
Subtotal	39,618	32.2^a	39,605	31.2	39,271	29.9^a
Regular full-time workers	83,589	67.8	87,135	68.8	92,222	70.1
Total	123,207	100	126,740	100	131,493	100

^aPercentages do not add up to subtotal because of rounding.

Source: GAO analysis of data from the BLS February Contingent Work Supplements for 1995, 1997, and 1999.

¹⁶The differences between the percentages for each category of workers (except self-employed workers) and the percentage of standard full-time workers are so small that they are not statistically significant. Therefore, the relative size of each individual category of workers, other than self-employed workers, is considered to be unchanged from February 1995 to February 1999.

Some Sectors of the Contingent Workforce Have Grown Over Time

Despite the data showing that the contingent workforce has not grown in recent years, data on longer-term trends, while limited, show that the number of contingent workers in some categories—certain types of temporary and part-time workers—has grown. For example, BLS collects information from employers on the “temporary help supply industry,” which includes the employees supplied by temporary employment agencies to client firms as well as individuals who work full-time for temporary employment agencies, such as recruiters.¹⁷ Although this information differs from the data on agency temps collected in the Contingent Work Supplement, it indicates that the industry has grown significantly, from 0.5 percent of the total workforce in 1982 to over 2 percent in 1998. From 1982 to 1998, the total number of jobs in the temporary help supply industry rose 577 percent, while during the same period the total number of jobs grew 41 percent. Furthermore, certain industries and communities have begun to rely heavily on agency temps. One study of the contingent workforce in the Silicon Valley area of California—an area with a large number of high-tech companies—noted that, from 1984 to 1995, the average number of people employed in temporary help agencies in Santa Clara County grew from 1.6 percent of the total workforce to 3.3 percent, more than a 100-percent increase.¹⁸ Over the same period, total employment in the area grew only 4 percent. The study also reported that, in 1997, temporary help agencies had over 200 offices in Silicon Valley that placed over 10,000 agency temps each week.

¹⁷BLS collects data on the temporary help supply industry—Standard Industrial Classification code 7363—as part of its annual Current Employment Statistics surveys. Because the data cover all jobs in the industry, they count individuals registered with more than one temporary agency multiple times if the workers received payments from more than one agency.

¹⁸Chris Benner, *Shock Absorbers in the Flexible Economy: The Rise of Contingent Employment in Silicon Valley* (San Jose, Calif.: Working Partnerships USA, May 1996).

Although not as dramatic as the growth in the number of temporary workers, the number of part-time workers has also grown over time. BLS has measured the number of part-time workers since the late 1960s. In 1969, part-time workers constituted approximately 14.5 percent of the total workforce; by 1993, that figure had risen to 17.6 percent.¹⁹ The largest increase in the proportion of part-time workers, however, occurred during the 1970s and early 1980s, when changes in business cycles—such as the recession in 1983—prompted the greater use of part-time workers. In recent years, the proportion of part-time workers has declined slightly, from 18.9 percent of the total workforce in 1994 to 17.4 percent in 1999. In reviewing the number of “voluntary” and “involuntary” part-time workers (workers who choose to work part-time and workers who would prefer full-time jobs, respectively), the Congressional Research Service reported that, although most part-time workers choose to work a short schedule, involuntary part-time work has grown over the long run.²⁰ The Congressional Research Service attributed this growth to several possible factors, including the changing economy; employers’ need to minimize labor costs; and the possibility that some workers do not have the skills needed to obtain full-time, long-term positions.

Another area of growth in the use of contingent workers is the use of leased workers. Although BLS did not collect information on leased workers as part of its Contingent Work Supplement, DOL obtained information on the employee leasing industry in a 1994 survey of state unemployment insurance agencies.²¹ Labor found that several states had registration and reporting requirements for leasing companies that allowed them to estimate the number of leased workers in the state. Although most of the states’ reporting requirements were new, a few of the states that provided longer-term estimates reported substantial growth in the number of leased

¹⁹As a result of a major redesign of the Current Population Survey in 1994, data on part-time workers collected before 1994 are not directly comparable to the data for 1994 and subsequent years. Before 1994, workers who usually worked 1 to 34 hours but who worked 35 or more hours during the week the data were collected were included in the total number of full-time, rather than part-time, workers. From 1994 forward, such workers have been included in the part-time total.

²⁰Linda Levine, *Part-Time Job Growth and the Labor Effects of Policy Responses: An Overview* (Washington, D.C.: Congressional Research Service, Dec. 1998).

²¹Department of Labor, *Employee Leasing: Implications for State Unemployment Insurance Programs* (Washington, D.C.: Department of Labor, Occasional Paper 97-1, 1997).

workers. For example, Florida reported that in 1989 there were 35,106 leased workers in the state; by 1993, this number had grown to 113,773.

Many Contingent Workers Are More Likely Than Standard Full-Time Workers to Have Low Incomes

Despite the diversity among workers in the categories that make up the contingent workforce, on average, these workers have lower annual family incomes than standard full-time workers. With the exception of contract company and self-employed workers,²² the percentage of contingent workers with annual family incomes below \$15,000 is larger than that of standard full-time workers.²³ For some contingent workers, such as agency temps, the differences are sizeable: almost 30 percent of all agency temps have family incomes below \$15,000, compared with 7.7 percent of standard full-time workers. Table 3 shows the number and percentage of workers by category with annual family incomes below \$15,000.

²²The differences between the percentages for these workers and the percentage of standard full-time workers are not statistically significant. Therefore, workers in these two categories are as likely to have family incomes below \$15,000 as standard full-time workers are.

²³The BLS data on family income from \$15,000 to \$40,000 are reported in \$5,000 increments; \$15,000 is the increment that is closest to and below the 1999 federal poverty threshold of \$17,028 for a family of four. Family income is defined as the combined income of all family members aged 15 years or older from jobs; net income from businesses, farms, and rent; pensions; dividends; interest; Social Security payments; and any other money income. Family members may include standard full-time workers.

Table 3: Workers With Annual Family Incomes Below \$15,000, 1999

Category of worker	Number of workers with family incomes below \$15,000	Percentage of workers in category with family incomes below \$15,000^a
Agency temps	338,503	29.8 ^b
Direct-hire temps	642,602	21.3 ^b
On-call workers and day laborers	373,045	18.5 ^b
Contract company workers	61,097	8.5 ^c
Independent contractors	663,212	8.8 ^b
Self-employed workers	415,674	7.5 ^c
Standard part-time workers	2,799,753	17.5 ^b
Subtotal	5,293,886	14.8^b
Standard full-time workers	6,477,268	7.7
Total workforce	11,771,154	9.8

^aThe percentages are based on the number of total respondents for each category. Individuals who refused to answer the questions on family income, had no response, or gave a "don't know" answer were not included.

^bThe difference between the percentage of workers in this category and the percentage of standard full-time workers is statistically significant at the .05 level.

^cThe difference between the percentage of workers in this category and the percentage of standard full-time workers is not statistically significant.

Source: GAO analysis of data from the BLS February 1999 Contingent Work Supplement.

Even when differences in the characteristics of the workers—such as age, education, race, industry, and occupation—are considered, most categories of contingent workers are more likely than standard full-time workers to have annual family incomes below \$15,000, and a few categories are much more likely. For example, agency temps are more than three times as likely to have annual family incomes below \$15,000 as standard full-time workers who are the same age, have the same levels of educational attainment, work in similar occupations and industries, and live in the same general areas of the country.

Contingent Workers Are Less Likely Than Other Workers to Have Benefits

Overall, contingent workers are less likely than standard full-time workers to have employer-provided health insurance and pension benefits. Even when their employers offer these benefits, contingent workers are less likely than other workers to participate in the plans. Moreover, contingent workers who have low family incomes are even less likely to have employer-provided health insurance and pension benefits. Finally, many

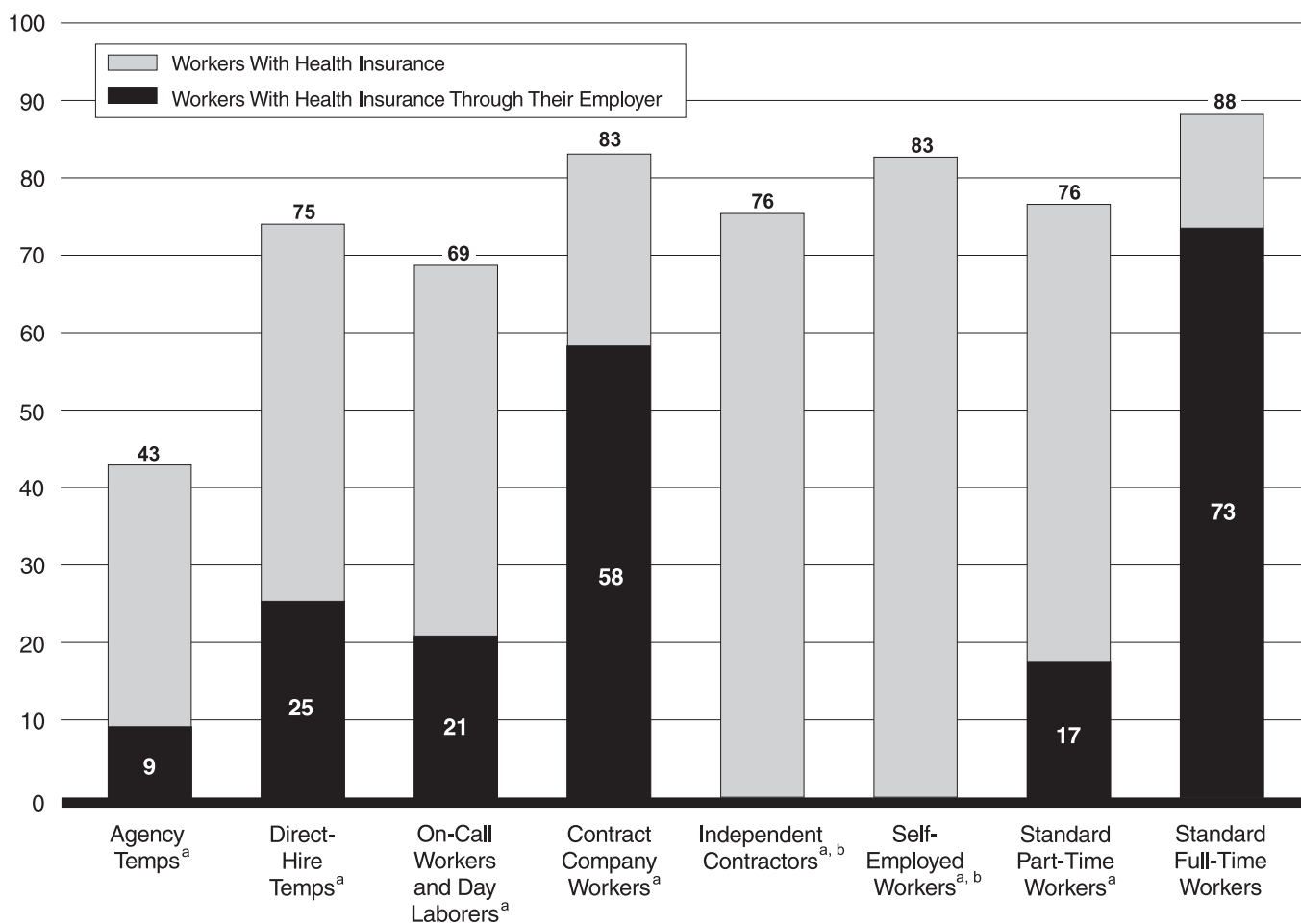
contingent workers do not qualify for unemployment compensation benefits because they do not meet the requirements for earnings or hours worked.

**Contingent Workers Are
Less Likely to Have Health
Insurance**

Contingent workers in all categories are less likely than standard full-time workers to have health insurance. Figure 2 shows the percentages of contingent workers who have employer-provided health insurance and contingent workers who have health insurance from any source, whether through their employer, their spouse, another family member, or a previous job—or whether they purchased it themselves.

Figure 2: Workers With Health Insurance, 1999

Percentage



^aThe difference between the percentage of workers in this category and the percentage of standard full-time workers is statistically significant at the .05 level.

^bMost workers in this category do not have an employer.

Source: GAO analysis of data from the BLS February 1999 Contingent Work Supplement.

As figure 2 shows, most categories of contingent workers are much less likely than standard full-time workers to have health insurance through their employers. However, when insurance from other sources is included, coverage for contingent workers significantly improves for all categories of workers and compares more favorably with coverage for standard full-time

workers. Of all the categories of contingent workers, agency temps are the least likely to have health insurance benefits: only 9 percent of agency temps have employer-provided health insurance (compared with 73 percent of standard full-time workers), and only 43 percent of agency temps have health insurance from any source (compared with 88 percent of standard full-time workers). The nature of temporary work, and the fact that many workers do not hold these positions very long, makes it difficult for agency temps to obtain employer-provided health insurance benefits. According to an industry association of temporary employment agencies, such work is generally short-term, intermittent, or transitional, with an average job tenure of under 10 weeks.²⁴ A senior executive of one of the largest temporary employment agencies reported that 30 percent of the agency's employees work for the agency 1 week or less, 50 percent work 1 month or less, and 70 percent work less than 2 months. The agency faces a significant challenge in designing benefit plans, according to this executive, because most of its insurance providers require an employee to have worked for the agency at least 1 month to be eligible for coverage, and many providers are moving to a 2-month requirement.²⁵

The overall health insurance picture worsens when the benefits of workers with annual family incomes below \$15,000 are considered. While 73 percent of all standard full-time workers have employer-provided health insurance benefits, this figure drops to 43 percent for those with low family incomes, as shown in table 4. Coverage for low-income contingent workers also drops. For example, the percentage of agency temps with employer-provided health insurance decreases from 9 percent to 3 percent when only those with family incomes below \$15,000 are considered. Once again, when health insurance from any source is included, the disparity between coverage for contingent workers and standard full-time workers decreases, and, in fact, direct-hire temps and self-employed workers are as likely as standard full-time workers to have health insurance.²⁶ The large differences

²⁴Testimony of the Senior Vice President of the National Association of Temporary and Staffing Services (now the American Staffing Association) before the Department of Labor's Advisory Council on Employee Welfare and Pension Benefit Plans, July 1999.

²⁵Statement of the Executive Vice President of Field Operations, Sales and Marketing, Kelly Services, Inc., before the Department of Labor's Advisory Council on Employee Welfare and Pension Benefit Plans, July 1999.

²⁶Although the percentages of workers in these two categories with health insurance from any source differ from the percentage of standard full-time workers with health insurance, the differences are so small that they are not statistically significant.

in percentages of those with employer-provided health insurance benefits and those with health insurance through another source illustrate that, in some cases, other employers, such as those of family members, are bearing some of the costs of providing health insurance benefits to contingent workers, rather than those workers' employers.

Table 4: Health Insurance Coverage for Workers With Annual Family Incomes Below \$15,000, 1999

Category of worker	Percentage with health insurance through their employer	Percentage with health insurance from any source
Agency temps	3 ^a	30 ^a
Direct-hire temps	17 ^a	55 ^b
On-call workers and day laborers	15 ^a	40 ^a
Contract company workers	^c	^c
Independent contractors	^d	39 ^a
Self-employed workers	^d	57 ^b
Standard part-time workers	14 ^a	52 ^a
Standard full-time workers	43	56

^aThe difference between the percentage of workers in this category and the percentage of standard full-time workers is statistically significant at the .05 level.

^bThe difference between the percentage of workers in this category and the percentage of standard full-time workers is not statistically significant.

^cThe number of respondents in this category was too small to provide statistically reliable data.

^dMost workers in this category do not have an employer.

Source: GAO analysis of data from the BLS February 1999 Contingent Work Supplement.

Even when workers may participate in the health insurance plans offered by their employers, many of them choose not to, usually because they feel that the cost of the health insurance plan is too high or because they are able to obtain benefits through another source. For example, in 1999, 46 percent of the agency temps who chose not to participate in their employers' health insurance plans did so because the plans were too expensive, while 27 percent chose not to participate because they were covered under another health insurance plan.

Contingent Workers Are Also Less Likely to Have Employer-Provided Pensions

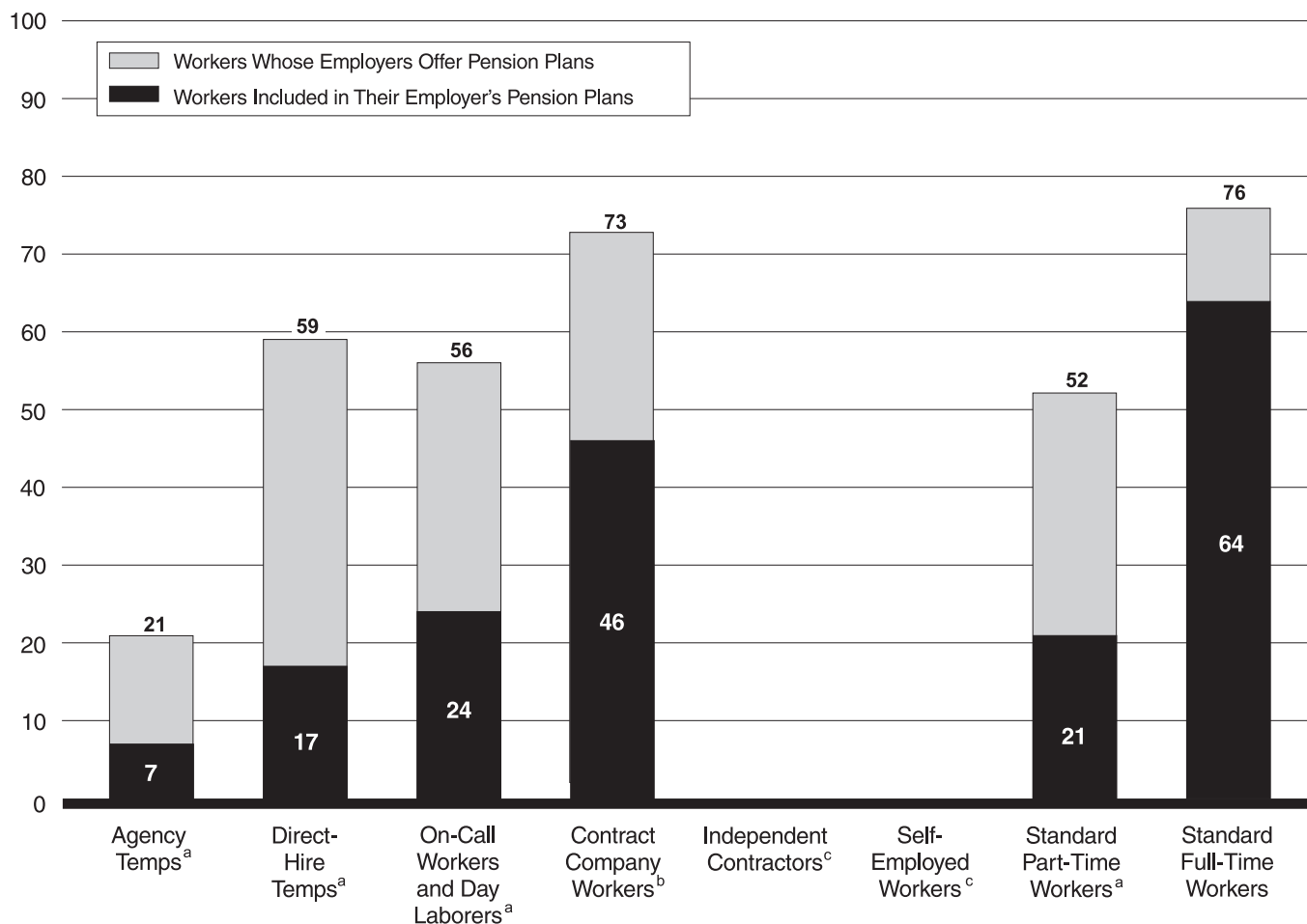
In addition to being less likely to have health insurance benefits, contingent workers are less likely than standard full-time workers to be included in employer-provided pension plans. When workers retire, they rely on three main sources of retirement income: pensions, Social Security, and personal savings. Because contingent workers are less likely than other workers to have employer-provided pensions, they rely more heavily on Social Security income and savings upon retirement. However, Social Security was not designed to provide sufficient resources for individuals to maintain their preretirement standard of living.

As shown in figure 3, 76 percent of standard full-time workers work for employers that offer pension plans to their employees, and 64 percent of them are included in these plans. With the exception of contract company workers, contingent workers are less likely to work for employers that offer pension plans. When their employers do offer pension plans, all categories of contingent workers who work for an employer are less likely to be included in the plans.²⁷ About 21 percent of agency temps—the category with the lowest proportion of pension plans—work for employers that offer pension plans, and only 7 percent are included in the plans. The predominant reason cited by workers for not participating in their employers' pension plans when they were eligible to participate was that they felt that the plans were too expensive.

²⁷The questions in the BLS Contingent Work Supplement related to pension plans were: "Does [your employer] offer a pension or retirement plan to any of its employees?"; "Are you included in this plan?"; and "Why not?"

Figure 3: Workers With Employer-Provided Pension Benefits, 1999

Percentage



^aThe difference between the percentage of workers in this category and the percentage of standard full-time workers is statistically significant at the .05 level.

^bThe difference between the percentage of contract company workers and the percentage of standard full-time workers whose employers offer pension plans is not statistically significant.

^cMost workers in this category do not have an employer.

Source: GAO analysis of data from the BLS February 1999 Contingent Work Supplement.

Most contingent workers with annual family incomes below \$15,000 are less likely than standard full-time workers with low incomes to work for employers that offer pension plans. The exceptions are direct-hire temps and standard part-time workers, who are as likely as standard full-time

workers to work for employers that offer pensions.²⁸ However, when their employers offer pension plans, all contingent workers with low family incomes are less likely than standard full-time workers to be included in the plans. As with health insurance, agency temps with low incomes are the least likely to be included in employer-provided pension plans. (See table 5.)

Table 5: Pension Benefits for Workers With Annual Family Incomes Below \$15,000, 1999

Category of worker	Percentage whose employers offer pension plans	Percentage included in their employers' pension plans
Agency temps	18 ^a	1 ^a
Direct-hire temps	51 ^b	5 ^a
On-call workers and day laborers	34 ^a	10 ^a
Contract company workers	^c	^c
Independent contractors	^d	^d
Self-employed workers	^d	^d
Standard part-time workers	43 ^b	10 ^a
Standard full-time workers	45	24

^aThe difference between the percentage of workers in this category and the percentage of standard full-time workers is statistically significant at the .05 level.

^bThe difference between the percentage of workers in this category and the percentage of standard full-time workers is not statistically significant.

^cThe number of respondents in this category was too small to provide statistically reliable data.

^dMost workers in these categories do not have an employer.

Source: GAO analysis of data from the BLS February 1999 Contingent Work Supplement.

²⁸Although the percentages of workers in these two categories who work for employers that offer pension plans differ from the percentage of standard full-time workers who work for employers that offer pensions, the differences are so small that they are not statistically significant.

Fewer differences exist, however, between the number of contingent workers and standard full-time workers who have other retirement accounts, such as individual retirement accounts (IRA) and Keogh plans.²⁹ As one might expect, many more independent contractors and self-employed workers than standard full-time workers have these types of retirement accounts—42 percent of independent contractors and 46 percent of self-employed workers, compared with 16 percent of standard full-time workers—because most independent contractors and self-employed workers do not have access to employer-provided pensions, and standard full-time workers do not have access to Keogh plans. In addition, 16 percent of on-call workers and 18 percent of contract company workers have these types of retirement accounts.

Contingent Workers Are Less Likely to Be Covered by Key Laws Designed to Protect Workers

Key laws designed to protect workers generally do not distinguish between employees who are contingent workers and other employees; therefore, contingent workers who are employees are generally covered under the laws. For example, the Fair Labor Standards Act establishes minimum wage, overtime, and child labor standards for workers who are “employees.” However, some laws contain requirements that exclude certain contingent workers or make it difficult for them to be covered.³⁰ For example, because they do not work enough hours, some temporary and part-time workers are not covered under the Family and Medical Leave Act. In addition, because these laws are based on the traditional employer-employee relationship, they generally cover only workers who are employees; independent contractors and self-employed workers, therefore, are not covered. Moreover, in some contingent work arrangements, it can be difficult to determine whether a worker is in fact an employee, and, in some cases, workers are misclassified by their employers. Further complicating the situation, it can be difficult to determine who the

²⁹IRAs are accounts available to certain workers, such as most workers not covered by an employer-provided pension plan and workers covered by an employer-provided pension whose income falls below a certain threshold. Contributions made to IRAs are generally tax-deductible, and the earnings made on IRAs are tax-deferred. Keogh plans are, generally, retirement plans for the self-employed. They closely resemble IRAs but allow higher annual tax-deductible contributions.

³⁰All of the key laws designed to protect workers have some exclusions, such as exclusions for small businesses, that apply to both contingent workers and standard full-time workers. We did not, however, have reliable data that would allow us to determine whether contingent workers are disproportionately affected by these exclusions.

employer is when more than one company is involved. Figure 4 describes the key laws. (See app. III for a more detailed description of these laws.)

Figure 4: Key Laws Designed to Protect Workers

Family and Medical Leave Act	Requires employers to allow employees to take up to 12 weeks of unpaid, job-protected leave for medical reasons related to a family member's or the employee's own health
Employee Retirement Income Security Act	Establishes uniform standards for employee pension and welfare benefit plans, including minimum participation, accrual, and vesting requirements; fiduciary responsibilities; and reporting and disclosure requirements
Fair Labor Standards Act	Establishes minimum wage, overtime, and child labor standards
National Labor Relations Act	Guarantees the right of employees to organize and bargain collectively
Unemployment Compensation	Pays benefits to workers in covered jobs who become unemployed and meet state-established eligibility rules
Workers' Compensation	Provides benefits to injured workers while limiting employers' liability strictly to workers' compensation payments
Occupational Safety and Health Act	Requires employers to maintain a safe and healthy workplace for their employees and requires employers and employees to comply with all federal occupational health and safety standards
Title VII of the Civil Rights Act	Protects employees from discrimination based on race, color, religion, sex, or national origin
Americans With Disabilities Act	Protects employees from discrimination based on disability
Age Discrimination in Employment Act	Protects employees over age 40 from discrimination based on age
Consolidated Omnibus Budget Reconciliation Act	Requires employers to allow employees and their family members who would lose coverage under employer-sponsored group health plans as a result of certain events, such as being laid off from or quitting their jobs, to continue coverage at their own expense for a limited time
Health Insurance Portability and Accountability Act	Guarantees the availability and renewability of health insurance coverage for certain individuals and limits the use of preexisting condition restrictions

Some Laws Have Requirements That Exclude Certain Contingent Workers

Contingent workers, such as temporary, on-call, and part-time workers, may not be covered by some of the laws designed to protect workers. For example, the Family and Medical Leave Act requires workers to have worked for an employer at least 12 months and at least 1,250 hours during the past 12 months in order to be covered. These conditions decrease the likelihood that workers who are temporary, on-call, or part-time will be covered. Although employers are not required to provide pension or health care plans to their employees, when plans are offered, the Employee Retirement Income Security Act (ERISA) has rules that govern which employees must be included in the plans in order to qualify for special tax treatment. For example, ERISA allows employers to exclude workers who have worked fewer than 1,000 hours in a 12-month period from their pension plans. ERISA also allows employers to exclude employees who have worked for the company less than 3 years as well as part-time and seasonal employees from the count of employees who must be included in self-insured medical plans and group-term life insurance plans. As a result, some temporary, on-call, and part-time workers may not be included in their employers' benefit plans. These exclusions are intended to strike a balance between protecting workers and not unduly burdening employers. For example, the exclusions in ERISA were enacted to recognize that it may be impractical or too costly for employers to include all short-term employees in their pension plans.

Some laws have exemptions for portions of certain industries or types of employers that may disproportionately affect contingent workers. For example, the Fair Labor Standards Act exempts agricultural employers from the overtime pay requirement and agricultural employers who do not use more than 500 days of labor in any calendar quarter from both the minimum wage and overtime pay requirements. These exemptions affect some categories of contingent workers more than standard full-time workers because a greater proportion of these contingent workers are in the agriculture industry; for example, 4 percent of direct-hire temporary workers and 3 percent of on-call workers and day laborers are employed in agriculture, compared with 1 percent of standard full-time workers (see app. III).

Similarly, the nature of contingent work makes it difficult for some contingent workers to meet state eligibility requirements for unemployment insurance benefits. Temporary and part-time workers may not meet the minimum earnings requirements, which vary from state to state, and these workers may have difficulty meeting the rules governing job loss because they have less flexibility when the circumstances of their jobs change. For example, temporary workers who choose this type of work in order to meet family obligations or to attend school might be more likely to quit if their employer changed the hours they were required to work or the job location. Nevertheless, they would be ineligible for unemployment compensation benefits in many states because they voluntarily quit without good cause.³¹ In addition, contingent workers can find it difficult to meet continuing eligibility requirements. According to a report by a worker advocacy group, unemployed workers who limit their search for new work to only part-time jobs are denied unemployment benefits in many states because the workers are not available for full-time employment.³² This group reported that, as of 1997, 10 states expressly allow unemployed workers to seek only part-time jobs and remain eligible for benefits, but most states do not, and 24 states find unemployed workers ineligible for benefits if they limit their search to part-time work.

³¹Applicants are generally disqualified from receiving benefits when job loss is due to voluntary separation without "good cause," although the definition of "good cause" varies from state to state. See app. III.

³²National Employment Law Project, *Mending the Unemployment Compensation Safety Net for Contingent Workers* (New York, N.Y.: National Employment Law Project, Oct. 1997).

Some contingent workers, such as temporary or contract company workers, also may find it difficult to meet the requirements of the National Labor Relations Act, as administered by the National Labor Relations Board, for joining an existing bargaining unit or forming a new bargaining unit. For example, temporary workers who want to join an existing collective bargaining unit at a work site must show that they have a “sufficient community of interest” with the permanent workers in the bargaining unit.³³ When a joint employment relationship exists, such as one or more temporary employment agencies and the client firm that hired the workers through the agency, both the employment agency (or agencies) and the client firm must consent to the inclusion of temporary workers in an existing bargaining unit.³⁴ According to some labor experts, these requirements have prevented temporary workers from joining unions and encouraged employers that want to scale back the size of bargaining units to contract out jobs.

Contingent workers may also find it difficult to form new collective bargaining units. For example, temporary workers who do not work at one employment site for an extended period of time, such as day laborers and home health care workers, may find it difficult to form bargaining units because they do not work at one location or with one employer long enough to identify with a particular group of workers and organize a union. In addition, some worker advocacy groups maintain that contract company workers have difficulty forming new collective bargaining units because employers that use contract company workers may cancel the contracts and contract with other companies when workers attempt to unionize.

³³A “sufficient community of interest” includes factors such as common supervision, working conditions, and interest in the unit’s wages, hours, and conditions of employment.

³⁴Agency temps, contract company workers, and leased workers may be considered employees of the temporary employment agency, contract company, or leasing company that hired them, employees of the client firm to which they are supplied, or both. When both are considered employers, this is called a “joint employment” or “coemployment” arrangement.

Workers Are Sometimes Misclassified by Their Employers

Because most key laws cover only workers who are employees, contingent workers in categories that are not considered employees—independent contractors and self-employed workers—are, by definition, not covered. As a result, the 8.2 million independent contractors and 6.3 million self-employed workers identified in the 1999 Contingent Work Supplement are not covered by the key laws. In earlier work, we have noted that employers often classify workers improperly. For example, they consider some workers independent contractors when, in fact, they are more appropriately considered employees.³⁵

In addition, it can be difficult to determine whether a worker is an independent contractor or an employee because the tests used to make this determination are complex and subjective, and they differ from law to law. For example, the National Labor Relations Act, the Civil Rights Act, the Fair Labor Standards Act, and ERISA use different definitions of an employee and various tests, or criteria, to determine whether workers are independent contractors or employees.³⁶

Moreover, employers have economic incentives to misclassify employees as independent contractors because employers are not obligated to make certain financial expenditures for independent contractors that they make for employees, such as paying certain taxes (Social Security, Medicare, and unemployment taxes); providing workers' compensation insurance; paying minimum and overtime wages; or including independent contractors in employee benefit plans. For 1984, the last year for which IRS made a comprehensive estimate of the extent of the problem, the agency estimated that 15 percent of employers misclassified 3.4 million workers as independent contractors. Even after accounting for the taxes paid by the misclassified independent contractors, this noncompliance produced an estimated tax loss for 1984 of \$1.6 billion in Social Security taxes, unemployment taxes, and income taxes that should have been withheld from wages.

³⁵*Tax Administration: Issues in Classifying Workers as Employees or Independent Contractors* (GAO/T-GGD-96-130, June 20, 1996); *Tax Administration: Issues Involving Worker Classification* (GAO/T-GGD-95-224, Aug. 2, 1995); and *Tax Administration: Estimates of the Tax Gap for Service Providers* (GAO/GGD-95-59, Dec. 28, 1994).

³⁶See app. III for descriptions of the tests used under each law.

Several court cases illustrate the problem of misclassification. For example, in 1996, thousands of individuals who worked for the Microsoft Corporation won a court case in which they claimed that they were actually employees of the company rather than independent contractors. In January 2000, the Supreme Court denied Microsoft's petition for review of an appeals court's ruling that, as a result of the misclassification—coupled with the fact that the plan in question covered the individuals if they were employees—the workers were improperly denied employee benefits.³⁷ In another case in which workers were misclassified as independent contractors, over 100 workers employed as chicken catchers at processing plants filed suit to obtain overtime wages. The court determined that they were employees of the company and, as such, entitled to overtime wages under the Fair Labor Standards Act.³⁸ In contrast, courts have often held that workers were properly classified as independent contractors and, therefore, not eligible for certain benefits and protections under the laws.³⁹

Workers in other categories are also sometimes improperly categorized by their employers and, as a result, are not included in employee benefit plans. Several court cases illustrate such instances. A group of workers who worked for the city of Seattle for 17 years as “intermittent” janitors were found by the court to have been incorrectly categorized by the city as temporary workers and improperly denied employee benefits.⁴⁰ In another case, county workers in King County, Washington, were categorized as “temporary” workers and denied health insurance, paid leave, and other benefits although they had worked full-time for the county for years. The case was settled in 1997; approximately 2,500 past and present employees were paid back wages of \$24 million and paid future benefits worth about \$18 million, and about 500 long-term temporary workers were placed in jobs with full benefits. The settlement also established a procedure to

³⁷*Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th cir. 1996) and *Microsoft Corp. v. Vizcaino*, U.S., No. 99-498, cert. denied Jan. 10, 2000.

³⁸*Heath v. Perdue Farms, Inc.*, 87 F.Supp. 2d 452 (2000).

³⁹*Schwiger v. Farm Bureau Insurance Company of Nebraska*, 207 F.3d 980 (8th Cir. 2000) and *Birchem v. Knights of Columbus*, 116 F.3d 310 (8th Cir. 1998).

⁴⁰*Scannell v. City of Seattle*, 97 Wn.2d 701, 648 P.2d 435 (1982) and *Scannell v. City of Seattle*, State of Washington, King County Superior Court Cause No. 844600, Settlement Agreement.

ensure proper employee classifications, including appeal rights for workers.⁴¹

Determining Who the Employer Is in Contingent Work Arrangements Can Be Difficult

Even when it is clear that workers are employees, determining who the employer is can be difficult in contingent work arrangements involving more than one employer. In these arrangements, the employer may be (1) an intermediary such as a temporary employment agency, contract company, or leasing company; (2) the client firm that obtains workers through the intermediary; or (3) both the intermediary and the client firm. It is often difficult in these cases for workers to determine which company is liable under the various laws designed to protect workers, and, as a result, much litigation has ensued. For example, in a recent case, a group of minimum-wage homecare workers sought to unionize and tried to bargain with the state agency that provided their paychecks.⁴² However, the workers were told by the state that their employer was the county, which assigned them to clients and set their hours. The county, on the other hand, claimed that it was not the employer, either. After 3 years, a court determined that the workers were independent contractors and, therefore, had no employer with whom they could bargain.⁴³

States also have a difficult time determining who is liable for unemployment insurance contributions and workers' compensation insurance when contingent work arrangements involve more than one company. For example, in its 1994 survey of state unemployment insurance agencies, DOL asked the state agencies which company was considered the employer for unemployment insurance purposes when workers were provided by leasing companies. Labor found that 27 states considered the leasing company the employer, 9 states considered the client firm the employer, and 14 states used various tests to make the determination.

⁴¹*Logan v. King County*, Washington State Superior Court, King County Cause No. 93-2-20233-4 SEA, Settlement Agreement (1997).

⁴²The description of the circumstances of this case, other than the final decision, came from a summary of the case published in an article written by the General Counsel for the Service Employees International Union. See Jonathan P. Hiatt, "Policy Issues Concerning the Contingent Work Force," *Washington and Lee Law Review*, Vol. 52, No. 3 (1995), pp. 739-53.

⁴³*Service Employees International Union, Local 434 v. County of Los Angeles*, 225 Cal. App. 3d 761 (1990).

Options for Expanding Benefits Coverage and Worker Protections Under the Laws Vary

Because contingent workers are less likely than other workers to receive benefits through their employers, several groups have proposed strategies to increase contingent workers' health insurance and pension coverage and their coverage under laws designed to protect workers. Some proposals build broadly on the current employer-employee relationship. For example, one legislative proposal would require employers to offer a comparable package of benefits to all of their workers. Other proposals focus on alternatives outside the traditional employment relationship, such as creating health plans run by associations that would allow individuals to pool together to purchase group insurance in an effort to obtain more affordable rates. These proposals usually involve trade-offs, which must be carefully considered in terms of their benefits, costs, and effects on the labor market.

Some Proposals Build on the Current Employer-Employee Relationship

On the national, state, and local levels, several legislative proposals have been introduced that are designed to build broadly on the current employer-employee relationship by increasing coverage under employer-sponsored benefit plans and laws designed to protect workers. For example, a proposal introduced in the Congress would mandate that a temporary worker who is an employee of a company be eligible to receive any benefit offered by the company to its other employees after the temporary worker has worked for the company for 1,000 hours during a 12-month period.⁴⁴ This proposal, however, might result in employers' choosing to reduce hours worked by temporary employees to fewer than 1,000 or to reduce salaries, the size of their workforce, or benefit packages offered in order to cover their increased costs.

⁴⁴The Equity for Temporary Workers Act of 1999 was introduced in the House of Representatives on June 22, 1999. The bill was referred to the Subcommittee on Workforce Protections.

At the state level, proposals in Massachusetts and Pennsylvania would require employers to offer comparable benefits and compensation to all of their workers regardless of the number of hours an employee works each week.⁴⁵ A similar proposal in Rhode Island called for amending state laws to make all workers eligible for prorated coverage for both health and pension benefits on the basis of hours worked. For example, the amount an employer contributed toward health care benefit coverage for a half-time worker would have been at least 50 percent of the employer's contribution for full-time worker.⁴⁶ Adoption of such proposals could expand coverage for workers who currently do not receive employer-sponsored health and retirement benefits. However, some experts believe that such proposals could have unintended effects because employers might reduce salaries or decrease the number of staff positions available to cover the increased costs of providing benefits to all employees; alternatively, employers might eliminate these benefits altogether. Moreover, some of these proposals might be preempted by ERISA, which takes precedence over state laws that relate to employee benefit plans.

Another approach would require employers to provide equal hourly wages and benefits for equal work regardless of employment status. According to the Economic Policy Institute,⁴⁷ some categories of contingent workers earn less than other employees in the same workplace who are performing the same types of tasks.⁴⁸ Moreover, these contingent workers are sometimes excluded from benefit packages offered to other workers. In response to the disparate earnings, the Institute and others have called for pay and benefit parity as a strategy for improving the overall conditions of these workers. Current laws do not prohibit pay differentiation based on the number of hours worked per week or on work arrangement. Requiring pay parity for all workers doing the same work could increase the overall

⁴⁵The Workplace Equity Bill was introduced in the Massachusetts State Legislature in the spring of 1999. At the time of our work, the bill was being reviewed at the committee level. The Contingent Workers and Part-Time Workers' Rights Act, S.B. 1480, was introduced in the Pennsylvania Senate on June 15, 1998, but was not enacted.

⁴⁶The Employment Security Benefits Act was introduced in the Rhode Island State Legislature in 1998 and 1999, but it did not become law.

⁴⁷The Economic Policy Institute, located in Washington, D.C., is a nonprofit organization that conducts research on policies aimed at achieving economic growth, prosperity, and opportunity. It was founded in 1986.

⁴⁸Arne Kalleberg and others, *Nonstandard Work, Substandard Jobs: Flexible Work Arrangements in the U.S.* (Washington, D.C.: Economic Policy Institute, 1997).

earnings for contingent workers, and mandating benefit parity could increase the likelihood of their receiving employer-sponsored benefits. On the other hand, employers might find such a requirement financially burdensome, as it would increase their labor costs, and they could decide to reduce wages, the size of their workforce, or the benefit packages they offer to their employees. In addition, such a requirement might be hard to implement, because it would be difficult to assess whether two people were actually doing identical work.

At the local level, laws have also been adopted that address the needs of some contingent workers. For example, several cities and counties have adopted living-wage ordinances to ensure that employers who do business with the city or county pay their employees a “living wage.”⁴⁹ Some of these ordinances cover only contractors in typically low-wage industries such as janitorial, clerical, food services, and temporary work, while others apply more broadly to city or county service contractors and subcontractors. Several of the ordinances also require covered employers to provide health insurance benefits to workers or require a higher rate of pay if the employers do not provide health benefits. For example, a Buffalo, New York, ordinance requires employers to pay \$1 an hour more than the prescribed wage if they do not provide health benefits to their employees.

Alternatively, a Department of Labor working group looking at issues related to contingent workers has called for, among other things, changes in the law that would make it easier for contingent workers to organize and bargain with their employers.⁵⁰ Because it can be more difficult for temporary workers than other workers to join an existing bargaining unit or establish a new unit, the working group called for modifying the law to allow contingent workers to organize and bargain with their employers more easily. The group also advocated extending to independent contractors, agency temps, and contract company workers the provisions of labor law that recognize the temporary and intermittent nature of work in the construction and garment industries by allowing employers and

⁴⁹The wage levels required by these ordinances range from \$6.22 to \$11.42 an hour. Most are indexed to increase over time with increases in the cost of living.

⁵⁰The Department of Labor maintains the Advisory Council on Employee Welfare and Pension Benefit Plans. Each year, the Advisory Council creates working groups that research specific areas of concern. In 1999, a working group was created to look at the benefit implications of the growth of the contingent workforce. The group’s final report was issued on November 10, 1999.

employees in these industries to enter into pre-hire agreements. Expanding collective bargaining for contingent workers could increase the likelihood that these workers receive pay equity and the benefits that other workers receive. However, it could still be hard for contingent workers to organize given the temporary nature of their work and the fact that some of these workers are not housed at the same employment sites for extended periods of time.

Other proposals address the misclassification of employees as independent contractors. For example, one proposal would make it more difficult for employers to misclassify their employees as independent contractors by clarifying the definition of an independent contractor.⁵¹ Because misclassification often results in the lack of coverage under employer-sponsored benefit plans and exempts workers from coverage under most laws designed to protect workers, making it more difficult for employers to misclassify employees as independent contractors could increase coverage for workers.

In a related area, a December 1994 report issued by the Commission on the Future of Worker-Management Relations—a joint commission of the Departments of Labor and Commerce also known as the “Dunlop Commission”—addressed the fact that the definitions of employee and employer vary from law to law. The Commission called on the Congress to adopt a single, more coherent definition of an employee based on the economic realities of the relationship between the worker and employer and apply it across the board to all laws. Similarly, the Commission recommended modernizing and standardizing the definition of an employer to reflect the economic realities of the relationship between providers and recipients of services and remove incentives for firms to avoid workplace responsibilities.

Adopting a more stringent and uniform definition of an employee could help increase benefits coverage for some contingent workers and provide greater protection under the laws designed to protect workers because they might not be as easily misclassified as independent contractors. As employees, these workers would be more likely to receive the same benefits as the rest of their employer’s workforce and would be covered by

⁵¹The Independent Contractor Clarification Act of 1999 was introduced in the House of Representatives on April 22, 1999. The bill was referred to the House Committee on Ways and Means.

laws that do not apply to independent contractors. In addition, providing a more uniform definition of an employer might help workers determine liability under various labor laws and reduce the need for litigation to resolve the issue of employer liability, particularly in situations involving more than one company. On the other hand, some of the laws have different definitions of an employee and an employer because they were enacted for different purposes; adopting a uniform definition might result in some laws being applied more narrowly. For example, in determining whether a worker is an independent contractor or an employee covered by the Fair Labor Standards Act, courts have used a broad definition of an employee. If a uniform definition of an employee was adopted for all laws, fewer workers might be covered under this act. In addition, employers might reduce benefits offered if their costs rose significantly as a result of having to include more individuals in the plans.

Some Proposals Seek New Approaches Outside the Traditional Relationship

In response to the changing nature of the employer-employee relationship, other proposals seek new approaches or alternatives outside the traditional relationship. These approaches are generally based at the local and state levels and vary in their specific strategies. For example, Working Today, a national nonprofit membership group, has developed a model for delivering portable, more affordable benefits to some contingent workers.⁵² Working Today is attempting to create a new safety net for these workers by providing access to the individual insurance market through intermediaries such as professional associations, unions, nonprofits, and employers. It plans to launch a demonstration project for workers in New York's new media industry later this year.⁵³

Other groups, including the New Jersey Temporary Workers Task Force and Working Partnerships USA in San Jose, California, have crafted codes of conduct for temporary employment agencies and called on the clients of temporary employment agencies to contract only with agencies that abide by these codes. One provision of these codes of conduct is that temporary employment agencies agree to offer health insurance coverage to temporary workers after they have been employed by an agency for 90

⁵²Working Today was founded in 1995 to promote the interests of America's independent workforce through advocacy, service, and education. The organization is based in New York City and has over 93,000 members.

⁵³The new media industry includes workers in high-tech jobs such as web page designers, software developers, and computer programmers.

days. Other provisions address treatment of workers by temporary employment agencies and require that the agencies provide workers with information about state and federal employment laws and abide by those laws. While these strategies may help expand coverage for contingent workers, they are in the beginning stages of implementation. Therefore, it is too early to evaluate their overall effect.

Another approach to expanding health insurance coverage among contingent workers would be to encourage individuals to obtain health insurance outside the employer-employee relationship by instituting tax incentives for those who pay for their own benefits, similar to the incentives offered to employers. Just as businesses may deduct the cost of health care premiums, self-employed individuals are currently allowed to deduct 60 percent of their health care premiums. By 2003, self-employed workers will be able to deduct 100 percent of the cost. Individuals who are not self-employed and purchase insurance on their own, however, are not afforded similar treatment under tax laws. The fact that these individuals' premiums are not tax-deductible, coupled with the high cost of individual insurance plans, can make it difficult for contingent workers to purchase coverage on their own. If the tax code were changed to permit all individuals who are not covered by employer plans, including contingent workers, to deduct the cost of their health insurance premiums as the self-employed do, there would be some costs involved: primarily, the cost of the federal tax subsidy itself, of programs to educate workers on the availability of the new deduction, and of the regulation and oversight needed to ensure that the provision was not abused.

In addition, numerous legislative proposals would increase accessibility to retirement benefits for workers who are not tied to an individual employer. For example, several proposals would increase incentives for individuals to put money away for retirement by expanding IRA tax benefits or creating tax-subsidized programs with matching federal contributions. While these programs would provide increased opportunities for retirement savings for contingent workers, they have been opposed for reasons such as their cost, their administrative complexity, and the tendency of savings subsidies to benefit higher-income individuals, who are more likely to save.

A number of state laws address other issues related to contingent workers. Several states have established commissions to evaluate the effects of their laws on contingent workers and have enacted legislation that establishes specific protections for temporary workers, day laborers, independent contractors, and part-time workers. For example, Rhode Island and North

Carolina have enacted laws that require comprehensive studies of the impact of contingent work in their states, and Rhode Island enacted the Temporary Employee Protection Act in 1999, which requires temporary employment agencies to provide written notice of job descriptions, pay rates, and work schedules to agency temps.

Agency and Other Comments

We provided DOL an opportunity to comment on this report. We also asked the labor experts on whose work we relied to comment. DOL officials generally concurred with our findings. They also provided several technical comments, which we incorporated. In addition, we incorporated technical comments from labor experts where appropriate.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will send copies to the Honorable Alexis M. Herman, Secretary of Labor; the Honorable Katharine G. Abraham, Commissioner of the Bureau of Labor Statistics; appropriate congressional committees; and other interested parties.

Please call me at (202) 512-7215 or Kay E. Brown at (202) 512-3674 if you or your staff have any questions about this report. Other staff who made major contributions to this report are listed in appendix IV.



Cynthia M. Fagnoni
Director, Education, Workforce, and
Income Security Issues

Scope and Methodology

To describe the demographic characteristics and categories of workers that make up the contingent workforce and estimate its size and the extent to which these workers have access to employee benefits, we used the data collected in the Current Population Survey as well as data collected in a special supplement to the survey—the Contingent Work Supplement.

The Current Population Survey

The Current Population Survey is designed and administered jointly by the Bureau of the Census and the Bureau of Labor Statistics (BLS). It is the source of official government statistics on employment and unemployment in the United States. The survey is used to collect information on employment as well as such demographic information as age, sex, race, marital status, educational attainment, and family structure. The survey is based on a sample of the civilian, noninstitutionalized population of the United States. Using a multistage stratified sample design, about 50,000 households are selected on the basis of area of residence to represent the country as a whole and individual states.

The Contingent Work Supplement

Designed by BLS, the Contingent Work Supplement is a set of questions about contingent workers and workers in alternative work arrangements. These questions were asked of all employed workers, except unpaid family workers, in February 1995, 1997, and 1999.

Our Definition of Contingent Workers

Although we used data from the Contingent Work Supplement, we used a definition of contingent worker different from the one used by BLS in its analyses of the data, which led us to combine the data differently. The BLS definition of a contingent worker is generally limited to workers in jobs “structured to be of limited duration.” On the basis of this definition, BLS constructed three estimates of the size of the contingent workforce.¹

¹See Anne Polivka, “Contingent and alternative work arrangements, defined,” *Monthly Labor Review* (Oct. 1996), pp. 3-9.

Although we believe it is useful to consider the nature and size of the population of workers in jobs of limited duration, as well as their access to benefits, we also believe it is useful to provide information according to categories of workers that are more readily identifiable and mutually exclusive. Therefore, we did not restrict our definition to include only workers with a relatively short job tenure but rather provided information on a range of workers who could be considered contingent under different definitions. We modeled our approach on research involving contingent workers, choosing categories of workers that we believe provide sufficient detail to allow readers to find easily data on the workers they consider to be contingent.² We developed information on direct-hire temporaries—workers hired directly by employers to work in temporary jobs—although the Contingent Work Supplement did not contain a question that directly asked for this information.³ We also combined on-call workers and day laborers because the definitions and characteristics of these workers are similar and the number of day laborers alone was not large enough to be statistically significant.

We did not include information on leased workers because of a general lack of understanding of the term and lack of data on these workers.

²See Susan Houseman, *Flexible Staffing Arrangements*, Aug. 1999, and Anne Polivka, Sharon Cohany, and Steven Hipple, "Definition, Composition, and Economic Consequences of the Nonstandard Work Force," in *Nonstandard Work Arrangements and the Changing Labor Market: Dimensions, Causes and Institutional Responses*, IRRA Series 2000, Marianne Ferber and Lonnie Golden, editors, forthcoming.

³We constructed the category of direct-hire temps using several questions from the supplement: We included workers who indicated that, although they did not work for a temporary employment agency, their job was temporary or they could not stay in their job as long as they wished for one of the following reasons: (1) they were working only until a specific project was completed, (2) they were temporarily replacing another worker, (3) they were hired for a fixed period of time, (4) their job was seasonal, or (5) they expected to work for less than a year because their job was temporary.

Characteristics of Contingent Workers

Percentage, unless indicated otherwise

Characteristic	Agency temps	Direct-hire temps	On-call workers and day laborers	Contract company workers	Independent contractors	Self-employed workers	Standard part-time workers	Standard full-time workers
Age								
16–19 years	5.8	16.4	9.9	4.8	0.9	0.3	24.3	1.6
20–24 years	20.9	22.6	10.9	11.3	3.1	2.6	16.2	8.6
25–34 years	29.3	23.4	22.8	30.6	17.9	14.0	15.5	26.1
35–54 years	34.8	28.0	38.4	45.3	56.6	54.2	29.3	53.0
55–64 years	6.5	6.2	10.1	6.1	14.7	20.1	8.1	9.4
65 and older	2.8	3.5	7.9	1.9	6.8	8.9	6.7	1.3
Mean age	35 years	33 years	39 years	37 years	45 years	47 years	35 years	39 years
Gender								
Men	42.2	47.8	49.3	70.5	66.2	63.4	29.9	56.1
Women	57.8	52.2	50.8	29.5	33.8	36.6	70.1	43.9
Race/origin								
White ^a	61.0	68.6	72.1	73.6	84.8	84.0	78.5	72.9
Black ^b	21.0	9.9	11.6	12.6	5.5	4.1	8.9	11.9
Hispanic	13.6	13.0	13.2	6.0	6.1	6.0	8.9	10.9
Other ^c	4.5	8.5	3.1	7.9	3.6	5.9	3.7	4.3
Education								
Less than high school diploma	15.5	15.8	20.0	9.4	8.4	7.9	24.7	9.9
High school diploma, no college	32.3	18.7	30.8	22.4	29.5	30.9	27.3	32.4
Some college	35.5	33.4	27.2	33.5	27.8	25.9	33.5	28.4
College degree	13.6	17.5	17.8	25.8	22.2	21.4	10.6	20.0
Graduate school	3.1	14.6	4.2	8.9	12.1	13.9	4.0	9.4
Geographic region								
New England	5.0	5.7	4.0	4.5	6.5	4.4	6.2	5.0
Mid-Atlantic	11.1	13.3	14.7	9.4	13.6	13.1	15.2	13.5
E. North Central	17.0	13.0	13.6	16.9	13.3	14.7	18.7	17.0
W. North Central	5.0	7.7	7.1	7.1	5.6	10.7	8.6	7.2
South Atlantic	21.0	14.7	14.5	17.4	19.2	16.6	15.5	18.5
E. South Central	3.3	5.8	5.9	4.7	4.9	6.6	5.0	6.2
W. South Central	10.8	9.3	12.4	9.4	9.8	11.2	8.8	11.3
Mountain	5.8	9.6	7.7	8.2	8.1	6.5	6.5	6.1
Pacific	21.1	20.9	20.1	22.4	19.0	16.2	15.5	15.4

Appendix II
Characteristics of Contingent Workers

(Continued From Previous Page)

Percentage, unless indicated otherwise

Industry								
Business services	23.4	3.0	4.6	9.4	9.3	5.4	3.5	4.5
Auto and repair services	0.6	0.3	1.2	1.1	3.3	3.8	0.6	1.1
Personal services								
--Private households	1.5	1.9	2.4	0.4	1.1	0	1.3	0.3
--Other personal services	1.7	4.2	3.7	0.8	5.5	6.3	3.2	1.9
Entertainment and recreation services	0.4	2.9	2.3	0.9	3.1	1.6	4.0	1.3
Professional services								
--Hospitals	3.6	4.3	7.4	5.6	0.2	0	4.2	4.1
--Health services	3.1	1.8	5.8	2.3	3.8	5.4	7.5	4.5
--Educational services	0.9	33.5	19.3	4.5	1.5	0.8	10.3	8.9
--Social services	0.5	3.6	2.2	0.6	3.1	5.9	3.5	2.1
--Other professional services	4.6	4.0	1.5	1.5	10.9	6.4	4.6	4.2
Subtotal—all services	40.3	59.5	50.4	27.1	41.8	35.6	42.7	32.9
Agriculture	0.6	3.6	2.9	0.4	5.0	15.0	1.3	1.1
Mining	0.1	0.2	0.4	2.8	0.2	0.1	0	0.5
Construction	2.5	5.7	10.7	9.3	19.9	6.6	1.7	5.6
Manufacturing								
--Durable goods	21.0	3.9	2.6	11.7	2.6	3.3	1.8	12.5
--Nondurable goods	9.0	1.8	2.1	6.3	2.0	2.3	2.1	7.6
Transportation	2.0	1.4	7.1	4.6	5.0	3.8	3.1	5.1
Communications	3.0	0.8	0.9	5.6	0.5	0.1	0.5	1.8
Utilities and sanitation	1.3	0.7	1.0	3.8	0.2	0.1	0.3	1.4
Wholesale trade	4.2	2.0	2.3	0.8	3.5	4.7	1.9	4.4
Retail trade								
--Eating and drinking places	0.5	4.3	6.8	1.7	1.7	5.2	16.0	3.5
--Other retail trade	3.4	8.0	7.6	2.9	8.5	16.5	23.0	10.0
Banking and other finance	3.6	1.1	0.7	3.9	1.8	1.1	1.9	3.6
Insurance and real estate	3.4	1.6	1.8	5.0	6.9	5.0	2.3	3.7
Forestry and fisheries	0	0.2	0.3	0	0.3	0.3	0	0.1
Justice, public order, and safety	0.5	1.1	1.2	0.4	0.1	0	0.6	2.6
Administration of human resource programs	0	0.5	0.4	1.6	0	0	0.2	0.8
National security and international affairs	0.1	0.9	0	3.6	0	0	0.1	0.6
Other public administration	1.8	2.5	0.9	5.2	0.1	0	0.6	2.0

Appendix II
Characteristics of Contingent Workers

(Continued From Previous Page)

Percentage, unless indicated otherwise

Occupation								
Executive, administrative, and managerial	4.3	6.8	5.0	12.0	20.5	24.8	5.1	16.0
Professional specialty	6.8	31.0	22.6	28.8	18.5	12.3	10.9	16.0
Technicians and related support	4.1	2.8	4.1	6.7	1.1	0.5	2.9	3.5
Sales	1.8	7.1	5.6	1.5	17.3	21.2	20.1	10.0
Administrative support, including clerical	36.1	19.7	9.0	3.4	3.4	4.9	17.4	15.0
Private household	0.3	1.8	2.2	0	1.0	0	1.2	0.2
Protective service	0.9	0.8	1.9	11.7	0.2	0.1	1.2	2.3
Other service	6.9	11.5	19.3	7.1	7.6	11.0	27.3	8.3
Precision production, craft, and repair	8.7	6.4	10.3	16.0	18.9	7.2	2.3	12.4
Machine operators, assemblers, and inspectors	18.6	2.7	2.2	0.6	1.7	1.0	2.1	7.0
Transportation and material moving	2.2	1.8	7.8	2.5	4.3	2.2	2.8	4.4
Handlers, equipment cleaners, helpers, and laborers	8.3	3.6	6.4	7.6	1.0	0.6	5.8	3.6
Farming, forestry, and fishing	1.0	4.0	3.6	2.2	4.4	14.1	1.1	1.2

^aWhite, non-Hispanic.

^bBlack, non-Hispanic.

^cOther, non-Hispanic.

Source: 1999 BLS Contingent Work Supplement.

Key Laws Designed to Protect Workers

This appendix provides a more detailed description of the key laws designed for workers' protection and their applicability to members of the contingent workforce. By definition, these laws apply only to employees— independent contractors and self-employed workers are not covered. However, no definitive test exists to distinguish whether a worker is an employee or an independent contractor. In determining whether an employment relationship exists under federal statutes, courts have developed several criteria. These criteria have been classified as the economic realities test, the common law test, and a combination of the two sometimes referred to as a “hybrid” test.

The economic realities test looks to whether the worker is economically dependent upon the principal or is in business for himself. The test is not precise, leaving determinations to be made on a case-by-case basis. The test consists of a number of factors, such as the degree of control exercised by the employing party over the worker, the worker's opportunity for profit or loss, the worker's capital investment in the business, the degree of skill required for the job, and whether the worker is an integral part of the business.

The traditional common law test examines the employing party's right to control how the work is performed. To determine whether the employing party has this right, courts may consider the degree of skill required to perform the work, who supplies the tools and equipment needed to perform the work, and the length of time the worker has been working for the employing party.

When the tests are combined in some type of hybrid, a court typically weighs the common law factors and some additional factors related to the worker's economic situation, such as how the work relationship may be terminated, whether the worker receives leave and retirement benefits, and whether the hiring party pays Social Security taxes.

Each of the laws is discussed in more detail below, including the tests used under each to determine whether a worker is an employee or an independent contractor.

Family and Medical Leave Act of 1993 (29 U.S.C. 2601)

The Family and Medical Leave Act of 1993 provides various protections for employees who need time off from their jobs because of medical problems or the birth or adoption of a child. The act requires employers to allow employees to take up to 12 weeks of unpaid leave for medical reasons related to the employee or a family member or to care for a newborn or newly adopted child without reduction of pay or benefits when he or she returns to work. It also requires employers to maintain the same health care coverage for employees while they are on leave that was provided when they were actively employed. To have this coverage, employees must have been employed for 12 months by an employer that employs 50 or more employees who work 20 or more calendar weeks in a year and must have worked at least 1,250 hours during the past 12 months.

Independent contractors and self-employed workers are not counted as employees for the purpose of determining whether an employer has 50 or more employees. Courts have applied the economic realities test to determine whether a worker is an employee or an independent contractor under this law.

Under Department of Labor (DOL) regulations, in joint employment relationships, only the primary employer is required to give various notices, grant leave, and maintain health benefits under the act. For employees of temporary employment agencies, the agency most commonly is considered the primary employer. Job restoration is the primary responsibility of the primary employer. Thus, if a business client of a temporary employment agency terminates a contract while an employee is on leave, the worker does not have the right to return to the original position; however, the staffing agency is responsible for placing the worker in a comparable position elsewhere.

Employee Retirement Income Security Act (29 U.S.C. 1001)

The Employee Retirement Income Security Act (ERISA) establishes uniform standards for employee pension and welfare benefit plans, including minimum participation, accrual, and vesting requirements; fiduciary responsibilities; and reporting and disclosure requirements. The act does not require employers to provide pension or welfare benefits to employees; it applies to any employer or employee organization engaged in commerce or any industry affecting commerce that maintains a covered employee benefit plan.

Contingent workers are covered by the act only if the employer allows them to participate in a pension or welfare benefit plan. Which employees are included in a plan depends on how the plan documents are drafted and interpreted. If an employer wishes to exclude some or all types of contingent workers from participating in a plan, the employer must clearly define the excluded groups of workers, and that definition must be properly applied. Otherwise, contingent workers whom the employer intended to exclude may be covered.

Whether contingent workers are counted as employees can be important in determining whether an employer is entitled to certain tax benefits under the Internal Revenue Code—such as a tax deduction for the cost of the benefits if the plan meets certain requirements, some of which involve counting employees. For example, an employer is entitled to certain tax benefits if its pension plan covers 70 percent of all lower-paid (“nonhighly compensated”) employees who worked 1,000 hours or more over the last 12 months. Employers that use many temporary workers may find meeting this requirement difficult and, therefore, may not provide pension plans for their employees.

Further, in applying the above coverage test, the Internal Revenue Code requires employers to include in their employee count certain employees supplied by third-party contractors. This requirement essentially covers “leased employees,” but the definition of a leased employee is broad enough to cover some employees supplied by temporary employment agencies. Being counted as a leased employee does not entitle the employee to any benefit; it means only that the employee is counted for purposes of determining whether the plan meets the 70-percent coverage test for favorable tax treatment.

Again, the above laws relate to employees, not independent contractors and the self-employed. The common law test is applied to determine whether a person is an employee or an independent contractor under ERISA.

Fair Labor Standards Act (29 U.S.C. 201)

The Fair Labor Standards Act establishes minimum wage, overtime, and child labor standards for employees. The act covers all employees of employers engaged in commerce or the production of goods that meet a dollar volume-of-business requirement. The act also covers all employees engaged in commerce or the production of goods for commerce; all employees engaged in domestic service covered by the law; all employees

of a hospital, residential care institution, or school; and all federal, state, and local government employees.

The act covers contingent workers, except independent contractors and self-employed workers, and does not distinguish between full-time and part-time employment or between temporary and permanent workers. In deciding whether a worker is an employee or an independent contractor under the act, courts have used the broad economic realities test.

Under DOL regulations, if an employee is employed in a “joint employment” relationship (a situation in which more than one employer has legal responsibility for the worker and employment by one employer is related to the employment by the other employer or employers), all of the employee’s work is considered one employment and all employers are responsible for compliance with the act. For example, if a temporary employment agency supplies an employee to a company that fails to pay proper overtime compensation, both the temporary agency and the company are liable for the amount of overtime pay the employee is owed.¹

National Labor Relations Act (29 U.S.C. 151)

The National Labor Relations Act guarantees the right of employees to organize and bargain collectively. The act applies to all employers and employees in their relationships with labor organizations whose activities affect interstate commerce. The act does not differentiate by firm size.

The coverage issue regarding temporary workers is whether they have a right to join the same bargaining units as permanent employees with whom they work. Generally, agency temps who work at one site on a fairly regular basis over a sufficient period of time can join the existing collective bargaining unit of permanent employees if the agency (or agencies, if more than one is involved) and the employer that hired the workers from the agency consent to this arrangement. However, temporary workers often do not work at one work site long enough to have an interest in joining a union.

In 1945, the Supreme Court held that the common law test for determining whether a person is an employee or an independent contractor under the National Labor Relations Act could be ignored in favor of broader policy

¹For more information on the Fair Labor Standards Act, see *Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place* (GAO/HEHS-99-164, Sept. 30, 1999).

considerations. In response to this decision, the Congress included language in the 1947 Labor Management Relations Act that amended 29 U.S.C. 151 to explicitly exclude “any individual having the status of an independent contractor” from coverage. In 1968, on the basis of this new language, the Supreme Court held that the common law test should be applied in determining whether a person is an employee or an independent contractor under the National Labor Relations Act.²

Unemployment Compensation

The unemployment compensation system is a joint federal-state system funded by both federal and state payroll taxes. It was established by the Social Security Act of 1935 and was intended to provide temporary relief through partial wage replacement for workers who lose jobs for economic reasons, such as lay-offs, and to help stabilize the economy during recessions. The system pays benefits to workers who become unemployed and meet state-established eligibility rules. Generally, only employees are eligible to receive unemployment compensation benefits; independent contractors and self-employed workers are not covered. Most states use a different type of test to determine whether workers are employees than those used for other laws. This test is called the “ABC test”: workers are considered employees unless (a) they are free from direction and control over performance of the work; (b) the service is performed either outside the usual course of the business for which it is performed or is performed outside of all places of business of the enterprise for which it is performed; and (c) the individual is customarily engaged in an independent trade, occupation, profession, or business.

Workers’ Compensation

State and federal workers’ compensation programs provide benefits for wage loss and medical care to injured workers and, in some cases, their families. At the same time, employers’ liabilities are limited strictly to workers’ compensation payments. Benefits paid depend on the nature and extent of the injuries and the ability of injured workers to continue working. For employees whose injuries are not serious, the only benefits received are of a medical nature. Employees with more serious injuries or illnesses may also be entitled to wage-loss benefits; vocational rehabilitation benefits; and schedule payments for the permanent loss, or loss of use of, parts or functions of the body. In addition, survivors of an

²*NLRB v. United Insurance Company of America*, 390 U.S. 254, 256 (1968).

employee may receive death benefits if the employee's death resulted from a job-related injury or illness. As with many other laws, independent contractors and self-employed workers are generally not covered. Most states use the common law test to determine whether workers are employees or independent contractors.

Occupational Safety and Health Act (29 U.S.C. 651)

The Occupational Safety and Health Act requires employers to maintain a safe and healthy workplace for their employees. The act does not distinguish contingent workers from other employees and covers contingent workers except for independent contractors and other self-employed workers. Either the economic realities test or the common law test is applied to determine whether someone is an independent contractor. According to the law, the party responsible for ensuring safety is the employer that is in direct control of the workplace and the actions of those who work there, including contingent workers such as agency temps and contract company workers who are supplied by another party. Thus, if an accident occurs at the workplace, the employer that created the hazard, not the temporary help firm or contract company, is liable.

Title VII of the Civil Rights Act (42 U.S.C. 2000e), the Americans With Disabilities Act (42 U.S.C. 12101), and the Age Discrimination in Employment Act (29 U.S.C. 621)

Title VII of the Civil Rights Act, the Americans With Disabilities Act, and the Age Discrimination in Employment Act protect all employees and job applicants from various forms of discrimination, such as discrimination based on race, national origin, gender, disability, or age. The Civil Rights Act and the Americans With Disabilities Act apply to employers that have 15 or more employees for each of 20 or more calendar weeks in a year. The Age Discrimination in Employment Act applies to employers that have 20 or more employees for each working day in each of 20 or more calendar weeks. These laws do not distinguish contingent workers from other workers; they cover all contingent workers other than independent contractors.

Further, each of these laws explicitly covers temporary employment agencies. Title VII of the Civil Rights Act explicitly prohibits employment agencies from discriminating on the basis of race, color, religion, gender, or national origin in classifying or referring people for employment. The Americans With Disabilities Act explicitly includes employment agencies in the definition of entities covered by the law. The Age Discrimination in Employment Act explicitly prohibits employment agencies from

discriminating on the basis of a person's age (if over 40) in classifying or referring a person for employment.

Using the hybrid test, courts have generally determined that independent contractors are not considered employees for purposes of federal antidiscrimination statutes. Independent contractors do, however, receive some protection from discrimination. Under a provision of the Civil Rights Act that protects contractual rights, independent contractors are protected against racial discrimination in both the termination of a contract and the creation of a hostile work environment.

In joint employment situations, one employer may be liable for the discriminatory acts of the other employer if the employer that is being held liable controls some substantial aspect of the employee's compensation or terms and conditions of employment.

Consolidated Omnibus Budget Reconciliation Act (29 U.S.C. 1161)

Continuation of group health plan coverage is required under this act for employees who otherwise would lose coverage as a result of certain events, such as being laid off by their employers. Individuals may continue coverage under their former employers' group health plans at their own expense. Depending on the qualifying event, the duration of required coverage ranges from 18 to 36 months. In general, when a covered employee experiences termination or reduction in hours of employment, the continued coverage of the employee and the employee's spouse and dependents must continue for 18 months. The act applies to all group health plans, except those maintained by employers with fewer than 20 employees. Workers who were considered employees under the group health plans are also employees for purposes of this act.

Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. 1320d)

This act guarantees the availability and renewability of health insurance coverage for certain individuals. It limits, and in most cases eliminates, the waiting time before a plan covers a preexisting condition for group health plan participants and beneficiaries who move from one job to another and from employment to unemployment. The act also creates federal standards for insurers, health maintenance organizations, and employer plans, including those who self-insure. The act does not require employers to offer health insurance to its employees or, if they offer health insurance, to cover part-time, seasonal, or temporary employees. However, the act increases the tax deduction for health insurance for self-employed

workers, including independent contractors, to 100 percent of premiums by 2007, which theoretically will expand coverage to that sector of the contingent workforce. It also provides new tax incentives to encourage individuals and employers to purchase long-term-care insurance.

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